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In the Supreme Court of the United States

October Term, 1940

RAMZ RUSSELL, Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

CITATIONS

Miscellaneous: Page

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OCTOBER TERM, 1940

No. 287

EARL RUSSELL BROWDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 399–403) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 28, 1940 (R. 403–404). The petition for a writ of certiorari was filed July 29, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by

the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the courts below properly construed U. S. C., Title 22, Section 220, punishing the "use" of a passport secured by a false statement, to include the exhibition of a passport, as proof of citizenship, to an immigrant inspector by a citizen returning to this country.

2. Whether the evidence established that the petitioner "willfully" committed the offenses charged.

STATUTE INVOLVED

The pertinent portion of U. S. C., Title 22, Section 220 (Section 2 of Title IX of the Act of June 15, 1917, c. 30, 40 Stat. 227), is as follows:

> * * * whoever shall willfully and knowingly use or attempt to use * * * any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than $2,000 or imprisoned not more than five years, or both.[1]

STATEMENT

An indictment in two counts was returned in the United States District Court for the Southern District of New York. The first count charged that

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[1] Section 220 is set out in full in the Appendix to petitioner's brief (p. 3).

the petitioner, having procured a passport by reason of a false statement to the effect that he had had no previous passport, willfully and knowingly used the passport on April 30, 1937, by presenting it to an immigrant inspector to secure entry into the United States (R. 2–3). The second count charged the petitioner with a similar use of the same passport on February 15, 1938 (R. 4–5). The case went to the jury, and a verdict of guilty on both counts was returned (R. 301). Petitioner was sentenced to imprisonment for four years and fined $2,000—two years and $1,000 on each count (R. 378). On appeal the conviction of the petitioner was unanimously affirmed by the Circuit Court of Appeals for the Second Circuit (R. 404).

The facts are uncontroverted. The evidence showed that the petitioner, a citizen of the United States (R. 347), made written application on August 31, 1934, for a United States passport (Exs. 2 and 18, R. 93–94, 306, 348–350). The application blank contained the clause "My last passport was obtained from ——— and is submitted herewith for cancelation." Petitioner wrote the word "None" in the blank space, signed the application and swore that the facts therein contained were true. Actually, petitioner had previously applied for and obtained three passports, under the names of Nicholas Dozenberg in 1921 (Ex. 4, R. 134–135, 144, 216, 311–312), George Morris in 1927 (Ex. 16, R. 154,

216, 343–344), and Albert Henry Richards in 1931 (Ex. 3a, R. 189–190, 216, 309–310).

On September 1, 1934, the Department of State issued a passport to petitioner in his own name in response to the application (R. 101). At the petitioner's request, the passport which by its terms expired on September 1, 1936, was on February 2, 1937, extended for two years from the date of expiration (Exs. 5 and 6, R. 86–87, 317, 331). On April 30, 1937, the petitioner returned to this country from a trip abroad and exhibited the passport to an immigrant inspector at the Port of New York as proof of his citizenship and right to enter the United States (Exs. 9 and 11, R. 115, 334, 335). Returning from another trip on February 15, 1938, petitioner again exhibited the passport to another inspector at the same port and for the same purpose (Exs. 10 and 12, R. 115, 334, 336).

ARGUMENT

I

Petitioner contends that the exhibition of a passport to an immigrant inspector as proof of his citizenship on his return to this country from a trip abroad is not a "use" of such passport within the meaning of Section 220, *supra,* because Congress intended solely to penalize the "use" of a passport abroad.

Statutory words are presumed to be used in their ordinary and usual sense, with the meaning

commonly attributable to them.[2] The word "use" means "employ," "employ for a purpose," "put to use," "avail one's self of."[3] Petitioner employed his passport upon returning from abroad for the purpose of identifying himself as a citizen, a use which patently falls within the ordinary meaning of the word. Nothing contained in the statute points to an intention solely to penalize a use abroad.

A use in this country has long been recognized by the Department of State, in a pamphlet entitled "Notice to Bearers of Passports,"[4] which was in effect in 1937 and 1938 when petitioner used his passport as charged. This "Notice" states that a passport will "enable the holder to establish his American citizenship upon his return to the United

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[2] *De Ganay* v. *Lederer*, 250 U. S. 376, 381; *United States* v. *Wurts*, 303 U. S. 414, 417; *Caminetti* v. *United States*, 242 U. S. 470, 485.

The presumption in this case is buttressed by the fact that the House Committee Report stated with respect to that portion of Title IX of the Act of which Section 220 is a part, that "The remaining sections of the title are self-explanatory. * * * The committee feel that all the remaining sections of the amended bill are drawn with sufficient clearness to be self-explanatory * * *." H. Rep. No. 30, 65th Cong., 1st Sess., p. 10.

[3] *Billings* v. *United States*, 232 U. S. 261, 281; *Astor* v. *Merritt*, 111 U. S. 202, 213; *Webster's International Dictionary; The Oxford English Dictionary.*

[4] First issued May 11, 1929; and reissued March 20, 1930; October 15, 1931; February 20, 1932; January 3, 1933; March 7, 1934; March 27, 1935; March 1, 1936; February 1, 1937; May 1, 1938; January 16, 1939.

States and thus facilitate his entry." Another long established use, in the words of the court below, is "the presentation of a passport to foreign consulates here for the procurement of visa, in anticipation of travel abroad" (R. 401).[5]

Petitioner relies upon several extrinsic aids to the construction of Section 220. None could overcome the force of the plain language of the statute. None, moreover, is persuasive even if the statutory language were doubtful.

1. The "history of the times" by which petitioner seeks to establish the evil at which the Act was aimed not only fails to prove an intention exclusively to penalize a "use" abroad, but actually discloses that some of the offensive uses preceding the 1917 enactment took place in this country.[6]

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[5] Petitioner points (Br. 11) to a statement made in Hunt's *The American Passport* (ed. 1898), p. 4, to the effect that a passport "is intended only for use abroad, and has no sanctioned uses, customary or statutory, within the United States * * *." But this statement was made long before the Department of State recognized a use in this country.

[6] Petitioner quotes Lansing's *Memoirs* to the effect that "Chief among these acts was the improper use of passports issued by the United States * * * to secure the safe passage of Germans through the enemy's lines of blockade to ports in neutral territory adjacent to Germany, which was their ultimate destination" (Br. 15–16). It is clear that the effectuation of this purpose required the use of a passport in order to procure a visa to these neutral countries from their representatives on American soil. The pages (52–53) of the Annual Report of the Attorney General for 1917 cited by the petitioner (Br. 16) summarize the case of *United States* v. *Franz von Rintelen et al.*, in which the

2. Petitioner relies upon a regulation of the Department of State in force in 1917 when Section 220 was enacted, to the effect that passports "are intended for identification and protection in foreign countries, and not to facilitate entry into the United States, immigration being under the supervision of the Department of Labor," and in substance contends that this construction was embodied in Section 220. Assuming that the regulation was called to the attention of Congress (cf. *Santa Fe Pacific R. R. Co.* v. *Lane,* 244 U. S. 492, 496), it is sufficient that the Department of State later omitted that regulation[7] and supplanted it by the "Notice to Bearers of Passports" (*supra,* p. 5) that a passport may be used to facilitate entry

defendants were "under indictment in New York for conspiracy to defraud the United States in connection with use by Rintelen, a German agent, of false passports *in leaving this country.*" (Italics supplied.) This was a use in this country.

[7] Revision of the passport regulations made by the "Rules Governing the Granting and Issuing of Passports in the United States," promulgated by the President on June 13, 1920, and Departmental Order No. 171, promulgated by the Secretary of State on June 12, 1920, omits the paragraph quoted above in the text. All subsequent Executive Orders and Passport Regulations make a similar omission. Executive Order No. 4382–A of February 12, 1926; Departmental Order No. 366 of February 12, 1926; Executive Order No. 4800 of January 31, 1928; Departmental Order No. 433–A of January 31, 1928; Executive Order No. 5860 of June 22, 1932; Departmental Order No. 538 of June 22, 1932; Executive Order No. 7856 of March 31, 1938; Departmental Order No. 749 of March 31, 1938.

256163—40——2

upon return to this country. It is settled that even the reenactment of a statute after uniform administrative practice does not freeze the administrative construction into the statute so as to curtail the administrative power prospectively to change its interpretation. Cf. *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 100; *Morrissey* v. *Commissioner*, 296 U. S. 344, 354. In this light, the withdrawal of the early regulation and its supersession by the long-continued "Notice" reinforce the view that the word "use" now embraces an employment of a passport for purposes of reentry into this country.

Moreover, whether or not the use of passports to prove citizenship on reentry into this country was customary in 1917, it was, as we have heretofore shown, a sanctioned and recognized use under regulations in existence in 1937 and 1938, when the acts charged in the indictment occurred. To apply Section 220 to such a use does not, as the Circuit Court of Appeals pointed out (R. 402), change the meaning of the statute. It merely, as the court declared, brings into operation the rule[8] that "a statute is prospective and its application to a given state of facts may change as new things or new uses of old things come into existence."

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[8] See *DeLima* v. *Bidwell*, 182 U. S. 1; *Puerto Rico* v. *Shell Co.*, 302 U. S. 253; Maxwell, *Interpretation of Statutes* (6th ed.), pp. 144–145, cited below.

3. Petitioner likewise argues that the cognate Sections 221 and 222 [9] in effect penalize the "use" of an expired passport (Br. 8–10), and asserts that citizens returning to this country constantly exhibit expired passports to immigrant inspectors but are never prosecuted therefor. From this he deduces an administrative construction of "use" in Sections 221 and 222 which excludes a "use" in this country and then carries that construction over to Section 220. Assuming the existence of the practice, it by no means follows that the practice is predicated upon the absence of a "use." Even if the term "use" has the same meaning in all of these sections, Sections 221 and 222 require proof of "willfulness" as well as "use." Administrative officials may well feel that a single use in good faith of an expired passport, which carries its deficiency on its face, to establish a citizen's identity lacks the "willfulness" that is an element of the crime. And the alleged failure to prosecute may be due to that fact rather than to the fact that these officials do not regard the employment of an expired passport to effect reentry as a "use." In any event, the test of the lawfulness of petitioner's acts cannot be that other possible or technical illegalities are condoned under other statutory provisions..

4. There remains the argument that in 1917 and at the time of petitioner's entries no law *required*

[9] Sections 221 and 222 are set forth at p. 3 of the Appendix to Petitioner's brief as Sections 3 and 4 of the 1917 Act.

those who entered the United States to produce a passport, and that the word "use" consequently was not intended to embrace such employment (Br. 14, 17–19). It might with equal logic be urged that the term has no application to a use abroad, for the law did not then and does not now *require* the use of a passport abroad. Pressed to its logical conclusion, that argument would deprive Section 220 of all effect. Petitioner has, we believe, entirely misconceived the scope of Section 220. Of course, it was not intended to "curb the entry into the United States of citizens" (Br. 17). But it was intended to curb the *use* of passports procured by reason of a false statement, wherever that use might take place.

II

Petitioner urges that "The courts below construed 'willfully and knowingly' in conflict with flat authority in this Court", citing *United States* v. *Murdock*, 290 U. S. 389, and *United States* v. *Illinois Central R. Co.*, 303 U. S. 239. The argument is that these cases define "willfully" in terms of "evil purpose" whereas the trial court defined it in terms of deliberate design.[10] Here, petitioner contends, no "willful" use was established inas-

[10] Petitioner failed to except to the District Court's charge defining willfulness in terms of deliberate design. It is therefore not entirely clear whether petitioner, on review of the denial of his motion to dismiss, is entitled to urge that the court applied an erroneous definition of "willfulness."

much as no evil intent or purpose was proved. To support this definition of "willful," petitioner relies chiefly on the *Murdock* case. That case, it is true, gives "an act done with a bad purpose" as one of five general meanings of willful. But it goes on to characterize as willful an act done (pp. 394–395)—

> [1] without justifiable excuse * * * [2] stubbornly, obstinately, perversely * * * [3] a thing done without ground for believing it is lawful * * *, or [4] conduct marked by careless disregard whether or not one has the right so to act * * *.

In attributing more than one meaning to willfulness, the Court merely took cognizance of the fact that the term is employed in defining widely differing statutory crimes and that, as has long been recognized, "mental elements of different crimes differ widely." *Queen* v. *Tolson,* 23 Q. B. D. 168, 185 (1889). "Malice," for example, Justice Stephen declared in the *Tolson* case, "means one thing in relation to murder, another in relation to the Malicious Mischief Act, and a third in relation to libel, and so of fraud and negligence" (*id.* at 187). And willfulness, like malice, is a special intent specified as an element of particular crimes (*id.* at 189). It is only "in very few criminal cases that 'willful' means 'done with a bad purpose'."[11]

[11] As the law grew, the "original requirement of an underlying evil motive * * * came to be supplanted by the requirement of specific forms of intent evolved separately

Townsend v. *United States*, 95 F. (2d) 352, 358 (App. D. C.), certiorari denied, 303 U. S. 664. And see *United States* v. *Illinois Central R. Co.*, 303 U. S. 239, 242–243.

The term "willfulness" is to be construed in the light of the purpose it is intended to serve. The qualification that an act must be willful is calculated to protect one who acts in good faith. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 387; *California* v. *Latimer*, 305 U. S. 255, 261. "Congress", said this Court in the *Murdock* case (at p. 396), "did not intend that a person, by reason of a bona fide misunderstanding * * * should become a criminal by his mere failure to measure up to the prescribed standard of conduct." It is plain that petitioner did not act in good faith. Repeated applications for passports under an assumed name accompanied by fraudulent documentation (R. 147, 345), repeated falsifications as to the issuance of prior passports (R. 309, 343), and repeated "use" of passports so obtained (R. 184, 187–188),[12] constitute a course of conduct that precludes any *bona fide* use of the passport obtained

for each particular felony." Sayre, *Mens Rea* (1932), 45 Harv. L. R. 974, 1019. Today, for example, arson involves "simply a narrow specific intent to burn a house occupied as a dwelling; the motive may be entirely free from malevolence or desire to injure." *Id.* at 1017.

[12] Petitioner was seen in Moscow in 1921 (R. 184) while the Dozenberg passport was outstanding. This passport was only usable by petitioner because it bore his photograph (R. 134, 186). No passport under petitioner's own name was issued until 1934 (R. 58). Similarly, in 1933, at which

through concealment of these offenses. It is, therefore, "willful" as defined in the *Murdock* case. Certainly these acts show the subsequent use of the passport to be "conduct marked by careless disregard whether or not one has the right so to act", and they show "a thing done without ground for believing it is lawful".

To the extent that petitioner protests that his use of the passport was not with a bad purpose, he falls upon another horn of his dilemma. This Court, in *United States* v. *Illinois Central R. Co.*, 303 U. S. 239, 242, declared that—

> In statutes denouncing offenses involving turpitude, "willfully" is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication.[13]

Petitioner's crime did not involve moral turpitude.[14] He was not convicted of "making a false

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time the Richards passport was valid and outstanding, petitioner was again seen in Moscow (R. 187–188). This passport was still in effect when petitioner procured the passport under his own name (R. 198–199).

[13] See *Armour Packing Co.* v. *United States*, 209 U. S. 56, 85–86; *Armour Packing Co.* v. *United States*, 153 Fed. 1, 23 (C. C. A. 8th); *Chicago, St. Paul, M. & O. Ry. Co.* v. *United States*, 162 Fed. 835, 842 (C. C. A. 8th), certiorari denied, 212 U. S. 579; *United States* v. *Erie R. Co.*, 222 Fed. 444, 449 (D. N. J.); *Arrow Distilleries* v. *Alexander*, 109 F. (2d) 397, 405 (C. C. A. 7th).

[14] Cf. *Bartos* v. *United States District Court*, 19 F. (2d) 722, 724 (C. C. A. 8th); *Coykendall* v. *Skrmetta*, 22 F. (2d) 120 (C. C. A. 5th).

statement," the act made unlawful by the first portion of Section 220, and one which may likewise be regarded as perjury. Instead, petitioner was convicted of *using* a passport secured by reason of a false statement. There are, to be sure, uses of documents fraudulently procured, such as the negotiation of forged notes and the like, which are so directly injurious as to be odious in themselves, and *mala in se* because they are moreover common-law crimes. Clark & Marshall, *Crimes* (2d ed. 1905), Section 5. But a citizen's use for identification at home or abroad of a passport secured through a false statement does not fall within this category. It was not a common-law crime; it does not injure the one to whom it is exhibited; and it does not directly injure the Government. The use is prohibited in order to maintain the integrity of United States passports, and the offense is therefore *malum prohibitum*. In consequence, under the rule of the *Illinois Central* case, the word "willful" in Section 220 must be construed as having no implication of evil purpose.

CONCLUSION

The case was correctly decided by the court below. There is no conflict of decisions and the petition presents no question of general public

importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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AUGUST 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940